

STATE OF MICHIGAN
COURT OF APPEALS

BODDY CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF
TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED
February 28, 2003

No. 237471
Court of Claims
LC No. 00-017592-CM

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the opinion and order granting the motion for summary disposition brought by defendant Michigan Department of Transportation (“MDOT”) under MCR 2.116(C)(8) and (10). We reverse and remand.

In this case, plaintiff is seeking \$724,954.66 in additional compensation for highway reconstruction work performed along M-29 in St. Clair County. According to defendant, the construction contract expressly prohibited extra compensation in this case because plaintiff failed to provide timely notice to the MDOT engineer about its intention to seek additional compensation. Plaintiff counters that it was entitled to extra compensation because defendant waived this contractual provision. The trial court, without specifying the subrule under which it granted defendant’s motion for summary disposition, found that plaintiff was not entitled to extra compensation because there was nothing in the record to indicate that defendant had given prior approval as required under the contract.

Because the trial court pierced the pleadings in granting summary disposition in defendant’s favor, we review the grant of summary disposition under MCR 2.116(C)(10). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). As clarified by the Supreme Court in *Maiden*:

The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence

produced at trial. A mere promise is insufficient under our court rules. [461 Mich at 121.]

In this case, the parties entered into a highway contract, which was governed by the 1990 Standard Specifications for Construction. Under § 1.05.12(a), the Notice of Claim provision, “the Contractor shall notify the [MDOT] Engineer in writing of the Contractor’s intention to make claim for such extra compensation before beginning work on which the Contractor intends to base a claim. . . .” It is undisputed that plaintiff failed to provide the MDOT engineer in question with written notice of its intent to file a claim before beginning the work upon which plaintiff’s claim is based.

Nevertheless, we agree with plaintiff’s contention that defendant waived strict compliance with § 1.05.12. See *Jacob v Cumings*, 213 Mich 373; 182 NW 115 (1921). Here, the record indicates that defendant waived strict compliance with the written notice requirement by agreeing with plaintiff to resolve disputes arising with the plans and specifications of the project without the need of filing a written notice of intent to file a claim. Thus, the trial court erred, as a matter of law, in ruling that defendant did not waive strict compliance with § 1.05.12(a) of the 1990 Standard Specifications for Construction.

Further, there was a genuine issue of material fact whether plaintiff was entitled to additional compensation for its highway reconstruction work. Specifically, although defendant maintains that plaintiff has failed to attach any records substantiating its alleged claims, we note that Horace Boddy, in his deposition testimony, indicated that there were handwritten notations documenting the cost for excavating and disposing of temporary aggregate off site in the amount of \$91,407.37. On remand, the trial court is thus instructed to determine whether plaintiff was entitled to additional compensation and in what amount.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio